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No. 85-1035

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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CROCKER NATIONAL BANK,

*Appellant,*

v.

PAUL PERDUE,

*Appellee.*

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**On Appeal from the Supreme Court of the State of California**

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# BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

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## QUESTION PRESENTED FOR REVIEW

Whether a complaint alleging that service charges are "unconscionable," based upon state law, states a valid claim upon which relief can be granted against a national bank, which is subject to the preemptive rules and regulations of the Comptroller of the Currency.

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The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, in order to urge this Court to note probable jurisdiction in the above-entitled appeal. In the decision from which the appeal is taken, the Supreme Court of the State of California determined that a complaint states a valid cause of action where it alleges that a bank's service charges are "uncon-

scionable." As much as we disagree with that conclusion, we recognize the paramount *authority* of the Supreme Court of California to determine that question as a matter of state law. Nevertheless, a substantial federal question is presented and should be resolved by this Court because the defendant in the case below is a *national* bank, to which *state* law may not be applied in the face of a contrary conclusion by the Comptroller of the Currency.

## INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States, having as members approximately 12,000 commercial banks, located in each of the fifty states and the District of Columbia. ABA membership includes banks chartered by the Comptroller of the Currency ("national banks") and banks chartered by the states in which they are located ("state banks"). Crocker National Bank, the appellant in this case, is a national bank member of the American Bankers Association.

The Association frequently appears in litigation, either as a party or as amicus curiae, in order to represent the interests of the membership on issues of great importance to the banking industry. ABA is concerned with any decision, whether legislative, administrative or judicial, which impedes the ability of our members, or any of them, to serve their customers, to compete on equal grounds amongst themselves or with other industries and institutions, or to make legitimate business judgments on matters such as the pricing of services at issue in this case.

Historically, the banking industry has been perhaps the most highly regulated of all industries in the United States. K. Davis, *Administrative* Law § 4.04 at 247 (1st ed. 1958). Banking regulation in the not too distant past has been restrictive of the ability of banks to engage in whatever business and in whatever manner good business judgment might dictate, but at the same time it had been protective as well. It immunized the industry from competition by nonbanks and fixed narrow limits for competition even within the industry.

That has all changed and is in the process of changing still further. In the past, for example, banking was a strictly local business. Banks in many states could not even establish branch offices; in other states, branch banking was limited to home counties of a bank or to the home county and contiguous counties; in some states, branching was permitted state-wide. The operation of banking organizations across state lines was almost unheard of. Bank depositors and borrowers now have simple and practical alternatives to dealing with a local banking organization. Loan production offices of banks operate across state lines. *Independent Bankers Association of America v. Heimann*, 627 F.2d 486 (D.C. Cir. 1980); so-called "money brokers" are happy to search out the financial institutions, wherever located, at which the best rate of return is offered and to "place" deposits in those institutions for customers nationwide. *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985). State laws in many jurisdictions have been amended to invite the establishment of banking offices in the state by out of state institutions. *See, e.g.*, Del. Code Ann. Tit. 5, §§ 801-808 (1985). Other states

have adopted regional banking laws which permit interstate acquisitions or mergers of bank holding companies within a specified geographic sector of the country. *See Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545 (1985). A variety of electronic funds transfer methods and devices permit instantaneous financial transactions between banks and far away customers. Thus, there is little reason any longer for a sophisticated California customer to transact business with a California bank if the customer can get a better deal from a New York bank or a Mississippi bank. Conversely, New York and Mississippi customers are entirely free to deal with California banks if those banks better serve their interests.

Not so long ago, there were strict limits on the interest that federally insured banks could pay to their depositors. *See* Regulation Q, 12 C.F.R. Part 217 (1979). The regulations kept the banks' cost of funds relatively low and did not allow realistic "price" competition in this respect among banks. That, too, has changed. Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, in March 1980. Title II of that Act created the Depository Institutions Deregulation Committee and directed that Committee to phase out "limitations on the maximum rates of interest and dividends which may be paid on deposits and accounts" (Section 204(a)). That directive was carried out and will be completed in less than three months. Banks may now offer "market rates" of interest to their customers on virtually all deposit accounts other than demand deposits.

During the phase-out period of interest rate limitations, commercial banks experienced a narrowing of the "spread" between their cost of funds, i.e., interest rate paid on deposits and the income received from the interest charged on loans.

Total interest *income* for the banking industry increased from 7.3% of average assets to 10.32% between 1978 and 1984. During the same time period, total interest *expense* of the industry increased from 4.17% to 6.97%. Loan loss provision increased, 1978-1984, from .25% to .55%. The result was that the net interest income for the banking industry—the "spread"—declined slightly from 2.88% of average assets to 2.80%. At the same time, non-interest income (which includes, but is not limited to, fee income) increased steadily from .69% to 1.09% of average assets. Non-interest expenses also increased at an even greater rate, from 2.5% in 1978 to 3.04% in 1984, resulting in a decline in net income for the banking industry over that six year period from .76% of average assets to .65%[1] A 1974 study by the Federal Reserve pointed out that between 1979 and 1983, income to banks from service charges on personal checking accounts increased anywhere from 42% to 100% depending upon bank size, but that at the same time the expenses to the banks increased even more rapidly. The net effect was that the return to banks on personal checking accounts was essentially unchanged or even lower (again depending upon bank

[1]These figures are a compilation of data taken from the Federal Deposit Insurance Corporation's Item Reference Lists, which, in turn, are taken from Call Reports each insured bank submits to the FDIC.

size) over the four year period covered by the study, despite the increases in service charges.[2]

Banks, like any other business, must make a profit in order to survive and prosper. In fact, federal law requires that federally insured banks be operated in a safe and sound manner. 12 U.S.C. § 1818. In order to do so in a newly competitive environment, many banks have chosen to impose fees upon formerly free or low cost services provided to their customers.[3] The decision of the California Supreme Court in this case seriously limits the ability of banks to establish service charges generally. While the case technically concerns only "overdraft" charges, there is no logical basis for distinguishing the case from any other fees which a bank might choose to charge for any of its services. If banks in California are no longer so freely able to charge the fees its customers are willing to pay, they must again look to the spread between interest earned and interest charged in order to make a profit. They must pay depositors less or charge borrowers more. And yet, as we pointed out above, that is no longer a practical choice for banks, because their customers may then choose to take their business elsewhere, even out of state, where banks with the unfettered ability to establish service charges have not been forced into such Draconian choices. That can only be harmful to the safety and soundness of banks in California. The state does not have the lawful capacity to inflict such harm upon federal instrumentalities,

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[2]*Bank Service Charges and Fees: Their Impact on Consumers.* A Study of the Board of Governors of the Federal Reserve System at the Request of the Consumer Advisory Council, at 4-5.

[3]*Id.* at 8-9.

such as the national bank appellant in this case or other national bank members of the American Bankers Association.

## SUMMARY OF THE ARGUMENT

As a national bank, the appellant Crocker is a federal instrumentality, subject in its operations to the plenary jurisdiction of the Comptroller of the Currency. In this respect, it is entirely comparable to a California-based federal savings and loan association subject to the plenary jurisdiction of the Federal Home Loan Bank Board. This Court has previously held California state law inapplicable to federal savings and loan associations because that law was preempted by the Bank Board's regulations. Since the Comptroller of the Currency in this case has, lawfully, specifically authorized national banks to assess whatever service charges the banks' business judgment dictates, it is clear that this Court's precedents govern here and compel a different result from that reached by the California Supreme Court. Insofar as the court below applies its construction of state law to a national bank, it has decided an important question of federal law in a way in conflict with applicable decisions of this Court.

## ARGUMENT

### I. Background Of The Case

The named plaintiff in the case below, Paul Perdue, once wrote a check, drawn on his account at Crocker National Bank, for which sufficient funds were not on deposit. It was not an unusual occurrence, and it was dealt with in a not unusual manner. The bank assessed a six dollar charge against Mr. Perdue. From

this seemingly insignificant incident, which never should have occupied the time and attention of any court,[4] has grown a major lawsuit, soon to enter its tenth year (Appendix to Appellant's Jurisdictional Statement at 3a, n. 4 *Crocker National Bank v. Perdue*, No. 85-1035 (U.S. Dec. 16, 1985)). The plaintiff, claiming that it only costs a bank 30 cents to process a nonsufficient funds ("NSF") check, filed suit alleging that a six dollar charge was unconscionable (App. 10a). Suit was filed in March, 1977, twice amended, and refiled in July, 1978, as a purported class action, on behalf of the named plaintiff and either all other persons having checking accounts at the bank or all customers who have paid NSF charges to the bank. The Superior Court dismissed the complaint in February, 1979, for failure to state facts sufficient to constitute a cause of action (App. 38a). The Court of Appeal, First Appellate District, affirmed in March, 1983 (App. 40a). The California Supreme Court reversed in July, 1985. Among other things, the court held that a six dollar charge for processing NSF checks *might* be unconscionable, and that the plaintiff was entitled to a trial in order to attempt to prove that it was. As a matter of state law, that decision is unreviewable by this Court. However, the Court held that state law, as so construed, applied to a national bank, since, according to the Court, no federal law has preempted the state law simultaneously declared by the Court. The case was remanded to the

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[4] "De minimis non curat lex" is a principle of long standing. *See, e.g., Porter v. Rushing*, 65 F. Supp. 759 (W.D. Ark. 1946) (Office of Price Administration lawsuit to recover $9 in "overcharges" from a poor woman was dismissed under this principle.) The maxim is now apparently more honored in the breach.

superior court for further proceedings, and Crocker National Bank timely filed its Jurisdictional Statement in this Court.

## II. State Law, As Construed By The California Supreme Court, Is Preempted By Lawful Regulations Of The Comptroller Of The Currency

National Banks, such as the Appellant Crocker National Bank, are federal instrumentalities. *American Bank & Trust Co. v. Dallas County*, 103 S. Ct. 3369, *reh. den.* 104 S. Ct. 39 (1983); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *Owensboro National Bank v. City of Owensboro*, 173 U.S. 664 (1899). This Court has been holding, at least since 1819, that it is unconstitutional for states "to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCullough v. Maryland*, 4 Wheat. (17 U.S.) 316, 436 (1819). That case, like this one, involved the efforts of a state to impede, burden and control a bank chartered by the federal government.

National banks have the statutory power to receive deposits pursuant to the National Bank Act. 12 U.S.C. § 24. Necessarily implied in this, and any other grant of power to the banks, is the power of national banks to charge fees for services rendered. The Comptroller of the Currency is specifically charged, by the National Bank Act, with the "execution of all laws passed by Congress relating to the issue and regulation of a national currency" (12 U.S.C. § 1), of which, of course, the National Bank Act is one.

While the California Supreme Court is clearly correct in stating that "[n]o provision of federal law

discusses bank charges for NSF checks, or, for that matter, bank charges for any services performed for depositors" (App. 2a), that hardly seems to matter much to the outcome of this case. The fact of the matter is that the Comptroller, having the clear authority to do so, has directed that "[a]ll charges to customers should be arrived at by each bank on a competitive basis" (12 C.F.R. § 7.8000 (1982); 36 Fed. Reg. 17,000, 17,018 (Aug. 26, 1971). This Court has held that "Federal regulations have no less preemptive effect than federal statutes. . . . A preemptive regulation's force does not depend upon express Congressional authorization to displace state law." *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153-154 (1982).[5] This ruling of the Comptroller is the one that was in effect at the time this alleged cause of action arose.[6] Even the plaintiff in the case below concedes that the six dollar charge imposed by the bank was "similar" to the fee schedules available elsewhere in the market (Complaint, ¶ 25, App. 58a. *See also* Jurisdictional Statement at 5, n. 3). Either the bank has conformed to

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[5]In *Fidelity Federal*, too, there was no federal statute which specifically governed the issue at hand—in that case whether California law pertaining to "due on sale" clauses in mortgages could be applied to federal savings and loans. The Federal Home Loan Bank Board, having powers over savings and loans comparable to the Comptroller's powers over national banks, had concluded that the state law in that case was preempted as to federal savings and loans by force of the Bank Board's regulations.

[6]The Comptroller subsequently amended the regulation in order to make it perfectly clear that state laws which prohibit, restrict or limit the amount of service charges assessed by banks are preempted. 12 C.F.R. § 7.8000(c) (1985).

the explicit direction of the Comptroller or, if it has not, its charges are subject to review only by the Comptroller, whose regulation would be in issue, and only for failure to set the charges "on a competitive basis." If the California Supreme Court's decision in this case stands, then the bank will be required to establish its charges on some basis other than a competitive one and thus be in violation of the Comptroller's regulation.

Therefore, the state law at issue here is nullified because of an actual conflict with federal law. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.' " *Fidelity Federal*, 458 U.S. at 153 (quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)).

Federal law has been held to preempt state laws pertaining to the deposit-taking function of banks in a number of cases. In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), a state law governing the advertising of savings accounts was held to be preempted by the National Bank Act, even though the National Bank Act said nothing about advertising. In *First National Bank v. California*, 262 U.S. 366 (1923), a state law governing the escheat of dormant deposit accounts in banks was held to be preempted by the National Bank Act even though the National Bank Act said nothing about the disposition of dormant accounts.[7] What the National Bank Act does

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[7]The law was amended in 1982. See 12 U.S.C. § 484(B). Congress may consent to the application of state laws to federal instrumentalities if it chooses to do so, but there has been no Congressional consent to the application of state laws pertaining to service charges to national banks.

say is that the Comptroller is responsible for the execution of that law.

> Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. . . . When the administrator promulgates regulations intended to preempt state law, the court's inquiry is similarly limited:
>
> > If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

*Fidelity Federal*, 458 U.S. at 153, 154 (citations omitted, quoting from *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

In this case, no serious argument could be advanced that the Comptroller of the Currency lacks authority to adopt rules and regulations governing any aspect of a national bank's deposit taking function. Nor can any serious argument be advanced that it is "arbitrary" for the Comptroller to authorize the charging of fees for services rendered by the banks which are set on a competitive basis. Nor is there anything in the language of the National Bank Act or its legislative history which indicates that Congress has ever felt otherwise. The Comptroller advanced logical and practical reasons for allowing the imposition of service charges (subject only to *his* review) at a level which would be not only compensatory and profitable to the

banks, but also which would serve as a deterrent to the misuse of banking services. 12 C.F.R. § 7.8000(b) (1985). It represents a reasonable accommodation of the Comptroller's mandate to assure the safety and soundness of banks subject to his jurisdiction and the interests of consumers. He has acted within his authority, and his rulings should be entitled to preemptive effect.

## CONCLUSION

Because the California Supreme Court has denied preemptive effect to the Comptroller's regulations, and its decision cannot be reconciled with precedents established by this Court, particularly in *Fidelity Federal Savings & Loan v. de la Cuesta*, and because of the deleterious effect of this decision upon national banks in California, the American Bankers Association respectfully urges the Court to note probable jurisdiction in this case.

Respectfully submitted,

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